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The New Forfeiture Clause Test in Executory Contracts for the Sale of Real Estate

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THE NEW FORFEITURE CLAUSE TEST IN EXECUTORY CONTRACTS FOR THE SALE OF REAL ESTATE

The principle of *Ashford v. Reese*[1] does not yet seem to have come to rest. In the recent case of *Aylward v. Lally*[2] the supreme court has added another chapter on the legal relationship of vendor and purchaser, the incidents of which in this state at the present time are none too well defined.

In the case referred to the court uses the following language:

> "No one of these cases[3] is referred to or overruled by the prevailing opinion in *Ashford v. Reese*, 132 Wash. 649, 233 Pacific 29, and the conclusion is irresistible that the doctrine of that case, and of the prior cases upon which it is based, *is limited to those contracts which by their terms are forfeitable, and we now so hold.*"

A possible distinction in the lines of authority on the vendor-purchaser relation in this state, based on the presence or absence of a forfeiture clause, was heretofore pointed out in this Law Review and the suggestion made that such a distinction is unsound in principle and without foundation in authority.[4] In the recent *Aylward* case,[5] the court, after setting out the time essence clause which, among other things, provided that "the party of the first part may declare a money default of the party of the second part in the performance of this contract and shall be entitled to the immediate possession of said premises," says, "forfeiture is not mentioned in the contract." Therefore, the court concludes to follow a line of authority to the effect that the purchaser under an executory contract on which payments remain to be made, but which does not contain a forfeiture clause, is the owner of "the full equitable title," and that such an executory contract not contain-

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[1] 132 Wash. 649, 233 Pac. 29 (1925). For prior discussions of this famous case see: P John Lichty, *Rights and Estates of Vendor and Vendee under an executory Contract for the Sale of Realty*, (1925) 1 WASH. L. REV. 9; Alfred J. Schweppe, *Rights of a Vendee under an Executory Forfeitable Contract for the Purchase of Real Estate: A Further Word on the Washington Law*, (1926) 2 WASH. L. REV. 1; (1927) 2 WASH. L. REV. 205, and George D. Lantz, *Rights of Vendees under Executory Contracts of Sale*, (1928) 3 WASH. L. REV. 1.

[2] 47 Wash. Dec. 41 (decided March 8, 1928).

[3] *Taylor v. Interstate Investment Co.*, 75 Wash. 490, 135 Pac. 240 (1913) *Roy v. Vaughn*, 100 Wash. 345, 170 Pac. 1019 (1918) *Barton v. Tombari*, 120 Wash. 331, 207 Pac. 239 (1922) *Shelton v. Jones*, 4 Wash. 692, 30 Pac. 1061 (1892) *St. Paul & Tacoma Lumber Co. v. Bolton*, 5 Wash. 763, 32 Pac. 787 (1893).

[4] (1926) 2 WASH. L. REV. 1, at p. 9.

[5] See note 2, *supra*.

ing. a forfeiture clause is foreclosable in equity apparently after the manner of an ordinary mortgage.

In support of this proposition the court cites a number of authorities. The first case referred to, *Taylor v. The Interstate Investment Company,*[6] is one in which the court had before it a contract not containing a forfeiture clause and it was held that the purchaser would in equity be regarded as having acquired the property in the land, and the vendor as having acquired the property in the price. This case may therefore be said to support the new criterion.

The next case referred to by the court in the recent case as supporting a distinction based upon the presence or absence of the forfeiture clause is *Roy v. Vaughn.*[7] The court seems to have completely overlooked the fact that in *Roy v. Vaughn*[8] the contract was executory and *contained a forfeiture clause.*[9] In *Roy v. Vaughn,*[10] although the contract contained a forfeiture clause, the court nevertheless authorized foreclosure of the contract in equity, stating that the relation between the parties was that of mortgagor and mortgagee. It has already been heretofore pointed out in this Review[11] that it has been constantly overlooked that *Roy v. Vaughn,*[12] when analyzed upon its facts, appears to constitute a complete overruling of that line of cases, largely dicta, on which the rule of *Ashford v. Reese,*[13] seems to be based. In *Roy v. Vaughn,*[14] the forfeiture clause was directly in issue and was not overlooked. The original complaint sought enforcement of the forfeiture clause; the amended complaint sought recovery of the balance due, to have that amount declared a lien, and to have the lien foreclosed. The point was squarely decided that this change did not constitute an election of remedies, because certain conditions precedent to invoking the forfeiture clause had not been complied with. *Roy v. Vaughn*[15] then appears to stand for the doctrine

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[6] 75 Wash. 490, 135 Pac. 240 (1913).

[7] 100 Wash. 345, 170 Pac. 1019 (1918).

[8] See note 7, *supra.*

[9] In *Roy v. Vaughn,* Respondent's Brief, p. 2, it is said: "The contract is in usual form and contains a forfeiture paragraph."

[10] See note 7, *supra.*

[11] (1926) 2 WASH. L. REV. 1, 6-8.

[12] See note 7, *supra.*

[13] See note 1, *supra.* That the early cases are largely dicta on this subject is pointed out by P. John Lichtly, note 1, *supra;* and by Chief Justice Tolman in his dissent in *Ashford v. Reese.*

[14] See note 7, *supra.*

[15] See note 7, *supra.*

that even though a contract contains a forfeiture clause it may be foreclosed in equity after the manner of an ordinary mortgage, on the theory that in equity the purchaser is the owner of the land. Hence, in citing *Roy v. Vaughn*[16] in support of the distinction sought to be made in the case of *Aylward v. Lally*,[17] the court seems to have completely overlooked what was actually held in *Roy v. Vaughn*,[18] and that the underlying principle of *Roy v. Vaughn*,[19] is in conflict with the doctrine of *Ashford v. Reese*,[20] inasmuch as the contracts involved in both cases contain forfeiture clauses.

The next case cited by the court in the recent case of *Aylward v. Lally*[21] is *Barton v. Tombari*.[22] In that case *Roy v. Vaughn*[23] was followed even though the contract did not contain a forfeiture provision.

The last two cases cited by the court in the recent case of *Aylward v. Lally*[24] are *Shelton v. Jones*,[25] *and St. Paul & Tacoma Lumber Co. v. Bolton*.[26] An examination of the opinions, briefs, and records in those cases discloses, first, that no forfeiture clause was involved in the contracts in question, and, second, that the presence or absence of a forfeiture clause was not even referred to or a determining factor in the mind of the court. In the early days, of course, forfeiture clauses had not yet taken on any semblance of importance, since in those days this state followed the general equitable rule.[27]

From an analysis thus far it appears that the announcement of

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[16] See note 7, *supra*.
[17] See note 2, *supra*.
[18] See note 7, *supra*.
[19] See note 7, *supra*.
[20] See note 1, *supra*.
[21] See note 2, *supra*.
[22] 120 Wash. 331, 207 Pac. 239 (1922) affirmed on rehearing 124 Wash. 696, 214 Pac. 170 (1923).
[23] See note 7, *supra*.
[24] See note 2, *supra*.
[25] 4 Wash. 692, 30 Pac. 1061 (1892).
[26] 5 Wash. 763, 32 Pac. 787 (1893).
[27] See especially *State ex rel. Trimble v. Superior Court*, 31 Wash. 445, 72 Pac. 89 (1903), a case which in modern times has been completely overlooked, as pointed out in 2 WASH. L. REV. 1, and in which, although the contract involved contained a forfeiture clause, the court expressly repudiates the doctrine which is now the rule of the court, stating that the doctrine of the vendee's equitable ownership is "so firmly settled against the contention of the relators by a train of uncontroverted authority that it is now beyond the realm of legitimate controversy." See also *Olson v. Seattle*, 30 Wash. 687, 71 Pac. 201 (1903), in which it was held that one who has paid a substantial portion of the purchase price for real property

the court in the recent case of *Aylward v. Lally*[28] can technically be sustained on the facts of four of the cases cited, but that *Roy v. Vaughn*[29] appears to be a misfit in this scheme of distinction.

The court says that none of the foregoing five cases which have just been reviewed is referred to or overruled in the prevailing opinion in *Ashford v. Reese.*[30] That statement is correct, no doubt, in so far as the want of reference is concerned. It may be added that *Roy v. Vaughn*[31] and *Barton v. Tombari*[32] were not referred to in either the majority or dissenting opinions in *Ashford v. Reese,*[33] and that the bearing of those two cases upon the controversy here in question was first pointed out elsewhere.[34] The other three cases cited, *Taylor v. Interstate Investment Co.,*[35] *Shelton v. Jones,*[36] and *St. Paul and Tacoma Lumber Co. v. Bolton*[37] were referred to in the dissenting opinion in *Ashford v. Reese.*[38] One would assume, therefore, since these cases were the basis of the dissent, that they must at the time of the rendition of the opinion in *Ashford v. Reese*[39] have been regarded as wholly inconsistent with *Ashford v. Reese,*[40] whereas now they are sought to be harmonized

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has such *an interest in land* as to enable him to maintain an injunction where public authorities seek to condemn the same without first making compensation. As appears from an examination of the original record, though not from the opinion itself, in *Olson v. Seattle, supra,* the contract involved (Plaintiff's Ex. A) contained a forfeiture clause in the following language: "Failure to pay final payment as specified means forfeiture of this amount." Both *State ex rel. Trimble v. Superior Court, supra,* and *Olson v. Seattle, supra,* were condemnation cases, and in both, despite the forfeiture clause, it was held that the vendee was the owner in equity and therefore entitled to compensation. Both of these cases are squarely opposed to *Shaefer v. Gregory Co.,* 112 Wash. 408, 192 Pac. 968 (1920), also a condemnation case, which is the foundation for *Ashford v. Reese.* In the first two cases it was held that the vendee under a forfeitable executory contract, being the equitable owner, was entitled to damages in a condemnation proceeding, whereas in the *Shaefer* case (without reference to the *Trimble* or *Olson* cases, *supra,* and without overruling them) the court held that the vendee under a forfeitable executory contract was not the equitable owner and therefore not entitled to damages in a condemnation proceeding.

[28] See note 2, *supra.*
[29] See note 7, *supra.*
[30] See note 1, *supra.*
[31] See note 7, *supra.*
[32] See note 22, *supra.*
[33] See note 1, *supra.*
[34] See note 11, *supra.*
[35] See note 3, *supra.*
[36] See note 3, *supra.*
[37] See note 3, *supra.*
[38] See note 1, *supra.*
[39] See note 1, *supra.*
[40] See note 1, *supra.*

by the application of the forfeiture-clause criterion. If at the time the opinion of *Ashford v. Reese*[41] was rendered it had been the opinion of the court that the two lines of decisions referred to could be harmonized upon the oasis of the presence or absence of a forfeiture clause, it may be supposed that the court would have done so, and that there would have been no dissenting opinions, but that the dissenting judges would have concurred specially on the ground that there was no inconsistency between the two lines of authority That these two lines of authority were at that time regarded as totally inconsistent seems plain not only from the fact of dissent itself but also from the language of the dissenting opinion of Judge Tolman. That they were considered inconsistent seems likewise plain from the majority opinion. While the court in the statement of facts at the commencement of the majority opinion refers to the fact that the contract provided that on default in payment the seller would have the right to declare the contract null and void, still the court in the later part of the opinion in discussing the question at issue discusses it generally, making it rather plain that the majority of the court did not regard the presence or absence of forfeiture clause as a criterion.

Not only does it seem that the court at the time of the decision of *Ashford v. Reese*[42] did not regard the two lines of authority as reconcilable by the application of the forfeiture clause criterion, but an examination of the cases decided since *Ashford v. Reese*[43] in which that case has been cited shows quite plainly that the court has considered at times at least that the doctrine of *Ashford v. Reese*[44] is generally applicable to all executory contracts for the purchase or sale of real estate regardless of whether a forfeiture clause is included in the contract.

Of the vendor and purchaser cases[45] decided *subsequent to Ash-*

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[41] See note 1, *supra*.
[42] See note 1, *supra*.
[43] See note 1, *supra*.
[44] See note 1, *supra*.
[45] *Holt Mfg. Co. v. Jaussand*, 132 Wash. 667, 233 Pac. 35 (1926) *In re Kuhn's Estate*, 132 Wash. 678, 233 Pac. 293 (1925), decided on same day as *Ashford v. Reese; Peck v. Farmer's National Bank*, 137 Wash. 629, 243 Pac. 861 (1926) *In re Field's Estate*, 141 Wash. 526, 252 Pac. 534 (1927) *Desmond v. Shotwell*, 142 Wash. 187, 252 Pac. 692 (1927) *Norman v. Levenhagen*, 142 Wash. 372, 253 Pac. 113 (1927) *Pratt v. Rhodes*, 142 Wash. 411, 253 Pac. 640, 256 Pac. 503 (1927) *Dysart v. Colonial Fire Underwriters*, 142 Wash. 601, 254 Pac. 240 (1927) *Kateiva v. Snyder*, 143 Wash. 172, 254 Pac. 857 (1927) *Bank of California v. Clear Lake Lumber Co.*, 46 Wash. Dec. 425, 264 Pac. 705 (1928).

The first case above cited, *Holt Mfg. Co. v. Jaussand*, decided on the

ford v. Reese,[46] in which that case has been cited, several concerned contracts containing forfeiture clauses and need not therefore be further adverted to, but several others involve contracts which either did not contain forfeiture clauses, or it did not appear from the opinion of the court whether a forfeiture clause was contained in the contract or not. It is plainly deducible from the language of this last group of cases, which will now be taken up, that the court considered the doctrine of *Ashford v. Reese*[47] generally applicable without regard to the existence or non-existence of a forfeiture clause in the contract involved in the case before the court.

The first case of this group to be discussed is *In re Fields Estate.*[48] In that case the court, citing *Ashford v. Reese,*[49] says:

> "While it is true that no title passed to the vendee under the executory contract from Fields to Bethel, nevertheless, for the purpose of administration it (the vendor's interest) should be treated as personal property rather than real property."

That this language constitutes confusion between the new doctrine in this state and the old equitable doctrine, inasmuch as the probate rule that the vendor's interest is personalty is predicated on the doctrine of equitable conversion, has already been pointed

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same day as *Ashford v. Reese,* involved a conditional sales contract of personal property, the contract containing no forfeiture clause. In cases involving conditional sales of personal property the presence or absence of a forfeiture clause has apparently never been considered of moment by the court, unless a tendency in that direction is to be deduced from the recent case of *West American Finance Co. v. Finstad,* 46 Wash. Dec. 252, 262 Pac. 636 (1928). However that may be, it is to be observed that the law of sales of personal property has historically had an entirely different development, especially with respect to the doctrine of equitable conversion and the assumption of jurisdiction by courts of equity, from the law of real property: in personal property sales cases the remedy at law has traditionally been regarded as adequate and, generally speaking, equity has declined jurisdiction. Although it has been forcefully argued (George D. Lantz, *Rights of Vendees under Executory Contracts of Sale,* (1928) 3 WASH. L. REV. 1) that logically the rule as to personalty and realty should be the same, the differing treatments that the two kinds of property have from almost time immemorial received in courts of equity, cannot be left out of account.

Even under the Sales Act, § 22(a) (Laws of Wash. 1925, chap. 142, p. 366) the risk is on the buyer, *Holt Mfg. Co. v. Jaussaund, supra,* being thereby undoubtedly changed. See Ayer, *Uniform Sales Act in Washington,* (1927) 2 WASH. L. REV. 162.

[46] See note 1, *supra.*

[47] See note 1, *supra.*

[48] See note 45, *supra.*

[49] See note 1, *supra.*

out herein,[50] but, aside from that, the foregoing language was used with reference to a real estate contract of which the court says.

> "The contract itself is not before us, nor was it before the lower court at the time of its final decree."

Here, then, the court is applying the doctrine of *Ashford v. Reese*[51] generally, although the contract is not in the record, and therefore it cannot be known whether it contained a forfeiture clause or not. The only deduction that can be drawn from these circumstances is that the court at the time of the decision in that case considered the doctrine generally applicable to executory real estate contracts without any consideration being had of the existence or non-existence of a forfeiture clause.

The next case to be considered is *Desmond v. Shotwell*.[52] In that case, without adverting to the fact whether the contract in question contained a forfeiture clause or not (and it appears nowhere in the opinion), the court says

> "A single question is presented for our determination. It is this May a purchaser in possession of real property under an executory contract for the sale thereof, claim a valid homestead therein?"

Ashford v. Reese[53] is cited for the general proposition that under an executory real estate contract no interest either legal or equitable passes to the vendee, and it is held that although no such interest is held by the vendee he may nevertheless declare a homestead. While an examination of the original record in the case discloses that the contract in question did contain a forfeiture clause, the fact remains that the court presents and discusses the question generally as applicable to all real estate contracts without regard to any such criterion as has now been laid down in the recent case of *Aylward v. Lally*.[54]

The next case to be considered is *Norman v. Levenhagen*.[55] In that case again it does not appear from the opinion whether the contract before the court contained a forfeiture clause or not. As a matter of fact, the contract was *not in the record* before the supreme court. The case turned solely on the question whether

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[50] (1927) 2 WASH. L. REV. 205.
[51] See note 1, *supra*.
[52] See note 45, *supra*. And see especially the discussion of this case in footnote 66, *infra*.
[53] See note 1, *supra*.
[54] See note 2, *supra*.
[55] See note 45, *supra*.

the findings supported the judgment, and the findings merely recited generally that Levenhagan had bought under executory contract, without even naming the vendor or referring to any terms of the contract. Again, the deduction to be made from this case is that at the time that case was decided no such distinction as has now been laid down in *Aylward v. Lally*[56] occurred to the court. It should be noted, moreover, that *Norman v. Levenhagan*[57] was decided by the court *en banc*.

The next case to be considered is *Pratt v. Rhodes*.[58] In that case the doctrine of *Ashford v. Reese*[59] is referred to and discussed at considerable length in order to demonstrate that the doctrine of that case does not militate against specific performance of a real estate contract by the vendee notwithstanding that the contract vests no title, legal or equitable, in the vendee. The contract involved is fully set forth in the opinion and, remarkable to say, there is no forfeiture clause or anything that reasonably could be construed as a forfeiture clause, contained in it. This case, then, leaves absolutely no question that the doctrine of *Ashford v. Reese*[60] was intended by the court to be generally applicable even though the contract did not contain a forfeiture clause. Moreover, the case of *Pratt v. Rhodes*[61] was reaffirmed by the court sitting *en banc*. In the briefs in that case the forfeiture-clause distinction was at some length championed and resisted by respective counsel. Appellant argued that since the contract did not contain a forfeiture clause, the *Ashford* case did not apply, and in support of this contention relied on several of the very cases now made the basis of the distinction by the court, whereas the respondent argued that all of these cases had been argued to the court in the *Ashford* case, and had been there overruled, finding support only in the dissenting opinion. The court, instead of accepting the distinction then forcefully pressed upon it, and distinguishing the *Ashford* case on that basis, ignores the claimed distinction, and at some length points out why the *Ashford* case does not negative the right to specific performance. This case leaves absolutely no question that the forfeiture clause test was not accepted by the court at the time this case was decided because, the contract in question not containing a forfeiture clause, an explanation of the

[56] See note 2, *supra*.
[57] See note 45, *supra*.
[58] See note 45, *supra*.
[59] See note 1, *supra*.
[60] See note 1, *supra*.
[61] See note 45, *supra*.

doctrine of *Ashford v. Reese*[62] would have been wholly unnecessary except on the theory that that doctrine was generally applicable to all executory contracts without regard to forfeiture clauses.[63]

The next case to be discussed is *Kateiva v. Snyder*[64] In that case the question arose whether the purchaser in possession under a real estate contract could resist a trespass upon the premises of which he had possession. The opinion itself is completely silent on the point whether the contract contained a forfeiture clause. *Ashford v. Reese*[65] is discussed and the position taken that the doctrine of that case does not prevent a purchaser from exercising such legal rights as are accorded to him by the possession[66] which he

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[62] See note 1, *supra*.

[63] It is true that the second point decided by the court is that upon the allegations of the pleadings which must be accepted as true, it appears that the appellants had fully performed the contract and therefore had acquired an equitable interest in land; but the fact remains that the court spends a full page in showing why the doctrine of *Ashford v. Reese* does not deny the vendee the remedy of specific performance even though he has no title, legal or equitable, in the premises. Even on the second point the holding seems questionable, inasmuch as the appellant's answer, pleaded willingness further to perform, but especially since it seems that the basic executory contract under which the respondent was buying, and which he was sharing with the appellant under the separate and independent agreement in suit, was not paid up, so that no title of any character had yet passed to either respondent or appellant.

[64] See note 45, *supra*. The contract in fact contained a forfeiture clause.

[65] See note 1, *supra*.

[66] At this point it may be noted that the court in announcing the new rule in Washington has constantly stated rather broadly that the vendee acquires "no title or *interest*, either legal or equitable" in land. See *Ashford v. Reese*, note 1, *supra*, *In re Kuhn's Estate*, note 45, *supra*, *Desmond v. Shotwell*, note 45, *supra*. In these cases the only question before the court was whether the vendee acquired an equitable *title*, and not whether he acquired any *legal interest*, aside from what may technically be denominated title. This broad language has got the court into serious difficulties and has obliged it within the limits of a single case solemnly to deny the vendee any title or *interest*, legal or equitable in land, and in the next breath to accord him the full legal rights of a possessor of real property. See *Desmond v. Shotwell*, note 45, *supra*, where the court after first reiterating the broad formulary phrase set down in *Ashford v. Reese*, grants the vendee a homestead right, since he "*has a sufficient interest in real property* to entitle him to maintain a home thereon." See also *Kateiva v. Snyder* note 45, *supra*, where the court, after citing *Ashford v. Reese*, holds that a vendee can enjoin a trespass upon the land because the contract is sufficient upon which the vendee can base his "right to possession of the land" and sufficient to authorize the vendee to "forbid any person to interfere with that possession." Obviously, a vendee who acquires a "right to possession" under his contract acquires at least a *legal interest* in land, even though not technically a *title*, legal or equitable. The court overlooks completely the traditional concept of "possession" in real property law as an interest in land, yes, for many purposes, *title*. See *Olson v. Seattle*, 30 Wash. 687, 689, 71 Pac. 201 (1903), where the court says, "The right of possession is a sufficient

acquires under the contract. From the fact that again the existence or non-existence of a forfeiture clause was not adverted to by the court it appears quite plain that the criterion which the court has now seized upon in the recent decision of *Aylward v. Lally*[67] was not at that time considered of moment.

It has already been heretofore pointed out[68] that prior to *Ashford v. Reese*[69] the court had held in *State ex rel. Trimble v. Superior Court*,[70] and *Olsen v. Seattle*,[71] in both of which the contracts involved contained forfeiture clauses, that the purchaser under a *forfeitable* executory contract is the owner in equity The remarkable feature of the *Trimble*[72] case is that it expressly repudiates the doctrine that is now maintained in *Ashford v. Reese*,[73] stating that the doctrine of the vendee's equitable ownership is "so firmly settled against the contention of the relators by a train of uncontroverted authority that it is now beyond the realm of legitimate controversy" The argument arising from these and other cases will not be here repeated, except to say that if they had not been lost in the books, the divergences now existing in the form of two lines of authority would probably not have arisen, *Ashford v. Reese*

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interest *therein* to enable a person having such right to invoke the remedies provided by law against a trespasser thereon." And see also the multitudinous cases in which it is held that possession constitutes notice of the rights of the possessor, and the myriad cases which hold that the possession of an adverse possessor is title against all the world except the true owner. If the court decides to adhere to *Ashford v. Reese*, it would undoubtedly be well to discard all the useless and embarrassing parts of the formula and confine the case solely to the denial of the doctrine of equitable conversion, i. e., of an *equitable title* in the vendee. If this is done, and all the incidents of the right of possession in the law of real property are kept in mind (possession being always a legal *interest* in land, though not always title) the rights of the vendee can be worked out according to well established concepts. If this is done, the court will not be further emberrassed by having in one and the same case to deny the vendee any "*interest*" in land and still having to protect the vendee by resorting to the concept of "possession", which constitutes a legal "*interest*" in land, though perhaps not always title. In the two cases above referred to the court was compelled to resort to this refuge, although it apperently was not conscious of the inconsistency involved in denying the vendee, according to the formula, any "legal interest" and yet resorting to the doctrine of "possession," in the one case at law and in the other in equity.

[67] See note 2, *supra*.

[68] (1926) 2 WASH. L. REV. 1, and see note 27, *supra*.

[69] See notes 1 and 27, *supra*.

[70] 31 Wash. 445, 72 Pac. 89 (1903).

[71] 30 Wash. 687, 71 Pac. 201 (1903).

[72] See notes 27 and 70, *supra*.

[73] See notes 1 and 27, *supra*.

would probably have been otherwise decided, and the whole present situation been obviated.

From the foregoing review of the cases the following appears

(1) That prior to *Ashford v. Reese*[74] a number of cases were decided by this court in which the contract in question, although containing a forfeiture clause, was held to give an equitable title to the purchaser. These cases are notably, *State ex rel. Trimble v. Superior Court*,[75] *Olson v. Seattle*,[76] and *Roy v. Vaughn*.[77]

(2) That the recent decision of *Aylward v. Lally*, in which the absence or presence in the contract of a forfeiture clause is laid down as the determining test, itself cites as support *Roy v. Vaughn*,[78] in which the contract concerned contained a forfeiture clause, but in which the contract nevertheless was foreclosed in equity on the theory that the vendee had an equitable interest in land that was foreclosable.

(3) That an examination of the opinions in *Ashford v. Reese*[80] seems to indicate that both the majority and the minority of the court considered the doctrine of the majority as applicable to all real estate contracts without regard to whether it contained or did not contain a forfeiture clause, even though the contract then in question happened to contain a forfeiture clause.

(4) That the cases decided since *Ashford v. Reese*,[81] in which that case is cited as authority, plainly indicate that the presence or absence of a forfeiture clause was not regarded as a determining test, for the reason that the doctrine of that case was applied in the rendition of the decisions where the contract was not before the court (hence it could not be determined whether it contained a forfeiture clause or not), or where it does not appear from the opinion whether the contract before the court contained a forfeiture clause or not, or where the contract as set forth in the opinion affirmatively shows that it contained no forfeiture clause. It would therefore seem to follow irresistibly from the foregoing analysis that the doctrine of the recent case of *Aylward v. Lally*,[82] in which the forfeiture clause is set down as the determining test,

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[74] See note 1, *supra*.
[75] See notes 27 and 70, *supra*.
[76] See note 71, *supra*.
[77] See note 7, *supra*.
[78] See note 2, *supra*.
[79] See note 7, *supra*.
[80] See note 1, *supra*.
[81] See note 1, *supra*.
[82] See note 2, *supra*.

is a new doctrine materially limiting the application of the rule in *Ashford v. Reese*[83] and raising new questions of construction that have not heretofore been considered vital.[84]

Moreover, if the provision in *Aylward v. Lally*[85] and the absence of a forfeiture clause make the contract a mortgage, which the court at other times has denied,[89] then is foreclosure of the contract the exclusive remedy, or may the summary remedy agreed to by

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[83] See note 1, *supra*.

[84] The clause declared time to be of the essence, entitled vendor to declare an immediate default, repossess the property, sell the land at public or private sale and to apply the proceeds on the purchase price. In substance this seems reasonably close to a forfeiture clause, since the vendee was summarily deprived of possession and enjoyment. Vendee's right to the excess, if any, from the resale, perhaps recognized the contract as still in existence, but can hardly be regarded of great value. The vendee's summary loss of possession on the day of default can hardly be reconciled with the mortgage statutes under which the mortgagee is entitled to possession after default until foreclosure sale or later. Rem. Comp. Stat., Sec. 602.

[85] See note 2, *supra*.

[89] In *Barton v. Tombari*, note 22, *supra*, in which the court permitted foreclosure of a contract not containing a forfeiture clause, the court said:

"The position of the parties on the sale of land on contract have been likened to that of mortgagor and mortgagee, and theoretically some such relation is established, but practically the transactions are quite different; in the case of a mortgage, the purpose of the lender is to make a profit on his money by way of interest, and to keep rates of interest moderate his protection must be liberal, both as to the margin of security and as to the obligation of the borrower. In the sale of land on contract, the profit of the creditor is in the price he secures, and to obtain this he carries the risk of the margin between the loan value and the selling value of the property to the extent that he is not covered by his initial payment.

"In the case of mortgage foreclosures we have express statutory direction by sec. 1119, Rem. Comp. Stat., *but we do not have any statute relative to contracts of this character* and as the contract itself makes no provision for this remedy, the respondent should be confined to the foreclosure of all equity redemption of the appellant in and to the property for the amount now due upon the contract."

In this respect, then, the *en banc* decision of *Barton v. Tombari*, appears to be overruled by *Aylward v. Lally*.

The position taken in *Barton v. Tombari* by the court *en banc* seems preferable. A real estate contract is not a mortgage, even though they may in some respects appear analogous. The instruments are different and are intended to effect different purposes. If the instrument is a mortgage, equity will never permit the equity of redemption to be cut off, whatever may be the summary remedy agreed to by the parties. See footnote 90. On the other hand, if the instrument is a real estate contract, equity will recognize a forfeiture if agreed to, or any other summary remedy that the parties have contracted for. See *Sleeper v. Bragdon*, 45 Wash. 562, 88 Pac. 1036 (1907) a specific performance suit by a vendee, where the court said, "The principles stated by the cited authorities are sound and reiterate the well-known doctrine that equity abhors a forfeiture, but they do not undertake to change the rule of equity that legal contracts will be enforced as made and in accordance with the acts of the parties thereunder." And see 2 WILLISTON ON CONTRACTS, § 937, for a summary of the reasons why the vendor is not a mortgagee.

the parties of immediate repossession and resale be resorted to at all?[90] Moreover, do the mortgage statutes generally apply, and has the vendee the usual period of redemption?[91] The court in *Aylward v. Lally*[92] holds one of the mortgage statutes applicable,[93] which it has likewise heretofore denied as to the identical section,[94] sitting *en banc*, in one of the very cases cited as authority in the recent case of *Aylward v. Lally*.[95] And in the next succeeding paragraph the court discusses the necessity of tendering a deed at the time of default, a procedure seemingly inconsistent with the mortgage concept.

That making the presence or absence of a forfeiture clause the determining test is not a sound criterion has heretofore been pointed out[96] and will not be here repeated at length. It suffices to say that it is hardly logical to hold that a forfeiture clause, which does not purport to make any declaration as to the character of the title conveyed by the contract, but merely to operate upon the title conveyed whatever it might be, shall be construed to determine the very nature of the title conveyed. If so, may it not

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[90] Whether the agreed remedy could be pursued at all was not before the court because foreclosure of the contract in equity was sought. If it is a mortgage, it would seem that any summary remedy to defeat the equity of redemption must on principle be denied. *Plummer v. Ilse*, 41 Wash. 5, 82 Pac. 1009 (1905). However, on principle, if equity recognizes such instruments to be not strictly mortgages, but legal contracts with a title reserved in the vendor, and will go to the extent of enforcing a forfeiture provision in such a contract, it would seem that it will enforce a summary remedy less stringent in its terms. See last paragraph of footnote 89.

[91] The predecessors of *Aylward v. Lally* in the peculiar proceeding of "foreclosing a real estate contract" do not seem to recognize these rights. See *Taylor v. Interstate Investment Co.*, 75 Wash. 490, 135 Pac. 240 (1913) *Roy v. Vaughn*, note 7, *supra*, *Barton v. Tombari*, see note 22, *supra*, and see *Stevens v. Irvin*, 132 Wash. 289, 231 Pac. 783 (1925). That there is a misnomer involved in stating that the vendor is foreclosing his "lien" instead of saying that he is foreclosing the vendee's "equity," see 3 POMEROY, EQ. JUR. (4th Ed.) sections 1260-3.

In *Roy v. Vaughn*, note 7, *supra*, amazingly enough, the court permitted 'foreclosure" even though the contract involved contained a forfeiture clause.

[92] See note 2, *supra*.

[93] The court says: "Treating the contract, then, as a mortgage, it clearly appears that, both in the mortgage proper and in the collateral mortgage, there is an express agreement for the payment of the sum of money secured, and the case is thus directly within the terms of our statute, Rem. Comp. Stat., sec. 1119 (P C. sec. 8204) which reads: "

[94] See note 89, *supra*, for the decision in which the court, initially in Department and ultimately *en banc*, denies the application of sec. 1119, of the mortgage statutes to "foreclosure" of real estate contracts not having forfeiture clauses.

[95] See note 2, *supra*.

[96] (1926) 2 WASH. L. REV. 1, 9-10.

be argued with equal force that a lease containing a forfeiture clause does not convey any element of title to the lessee? Yet it has never been so held. It does not seem sound in principle to say that a vendee has no interest in real estate because his interest may be forfeited. The very provision for forfeiture assumes that he has an interest and that interest not a mere chattel interest, but such an interest as the vendee would have under the applicable law, because the forfeiture clause does not assume to change the character of the interest acquired by the vendee but merely to forfeit that interest, whatever the law says it consists of. It is not the forfeiture clause which *ipso facto* negatives the vendee's having an equitable interest in land. The same equity jurisprudence which gives the vendee equitable interest also recognizes the propriety and enforcibility of forfeiture clauses; for while equity abhors a forfeiture, it will, in a proper case, enforce it.[97]

If the court adheres to the decision in *Ashford v. Reese,* it would seem that it would have been preferable to limit that case, not on the basis of the casual forfeiture feature, but rather on the basis of the specific question then before the court, viz., risk of loss in case of destruction of the property without fault of either party Thus putting the loss on the vendor, without repudiating the doctrine of equitable conversion in its entirety, has the support of an eminent writer.[99] From the denial of the doctrine of equitable conversion as to merely one of the incidents of a real estate contract, viz., risk of loss (in respect to which not all authorities agree that equitable conversion takes place or should control),[100] it does not necessarily follow that the doctrine must be repudiated as to all the incidents of the vendor-purchaser relationship, that is to say, that the doctrine must be repudiated completely *In re Fields Estate,*[101] which, in spite of *Ashford v. Reese,*[102] recognizes equita-

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[97] 10 R.C.L. 331, and see last paragraph of footnote 89.

[98] See note 1.

[99] Mr. Justice Harlan F Stone, "*Equitable Conversion by Contract,*" 13 COL. L. REV. 369. For other discussions of the subject see, Samuel Williston, "*Risk of Loss After an Executory Contract of Sale in the Common Law.*" 9 HARV. L. REV. 106, 111, and 2 WILLISTON ON CONTRACTS, secs. 927-954, George L. Clark, "*Some Problems in Specific Performance,*" 31 HARV. L. REV. 271, 283; George D. Lantz, "*Rights of Vendees Under Executory Contracts of Sale,*" 3 WASH. L. REV. 1.

[100] See note 103.

[101] See note 48, and main text of this article at the point where that footnote appears. And see also *Roy v. Vaughn,* note 7, *supra,* in connection with main text at that footnote.

[102] See note 1.

ble conversion in probate, could then be accepted as to its result although not as to its explanation. If the doctrine of *Ashford v. Reese*[103] were so limited, the other incidents of the vendor-purchaser relationship could be worked out to agree with the general law, without the necessity of continued explanations as to what the logical consequences of that case are or are not. The proneness to confuse the old with the new doctrine in this state has already been pointed out;[104] and, in the attempt to make *Ashford v. Reese*[105] generally applicable, i. e., to repudiate the doctrine of equitable conversion as to all the incidents of the vendor-purchaser relationship, the court appears to remain in a continued state of embarrassment, not so much in its results perhaps, as in its explanations,[106] explanations which are made only because the court appears to regard the new doctrine universally applicable to all situations.

Since the court now recognizes equitable conversion in cases of contracts not containing a forfeiture clause, it might well recognize that doctrine in cases of contracts containing a forfeiture clause as to other incidents of the relationship,[107] except perhaps[108] as to risk of loss, involved in *Ashford v. Reese.*[109]

Should the rule of *Ashford v. Reese*[111] as recently limited, be changed either by judicial decision or legislative act? In the light of the conflicting decisions down to very recent date, and of the different views which different members of the present court have entertained at different times, it may perhaps be argued that no fixed rule of property has been established.[112] Certainly, a

[103] See note 1.

[104] See main text in connection with note 48. And see second paragraph of note 114.

[105] See note 1.

[106] See for example *Pratt v. Rhodes*, note 45 *supra*, where the court says: "It is not held that such a contract is a nullity" and then grants specific performance on grounds but vaguely stated. Obviously, the result is correct on a principle sensed, perhaps, by the court but not expressed, viz., that specific performance may be had even though equitable conversion does not take place. The fiction of equitable conversion is a *result* of the doctrine of specific performance, not a *cause* of it. The latter may exist without the former. And see also, *Kateiva v. Snyder*, note 45, *supra*, where the court said, "But we did not hold such a contract a nullity" see discussion of this case in footnote 45. See also footnote 114.

[107] It has done so in *Roy v. Vaughn*, note 7, *supra*. And see cases discussed in note 27.

[108] See especially note 114 and main text relating thereto, on status of risk of loss in this state. And see last paragraph of note 45 as to present status of loss in conditional sales contracts of personalty.

[109] See note 1.

[111] See note 1, *supra*.

[112] The court has not hesitated to overrule cases relating to community property. *Schramm v. Steele*, 97 Wash. 309, 166 Pac. 634 (1917) *Olive Co. v. Meek*, 103 Wash. 467, 175 Pac. 33 (1918).

review of the cases even since that important decision fails to reveal a satisfactory fixity of principle, in a subject matter in which fixity and clarity of principle are above all things desirable. Possibly the court has reached a point where it may desire to make a complete reconsideration of the whole subject. An examination of the cases shows that virtually every judge that has ever been, or now is, on the court has at some stage of his judicial career agreed to the doctrine of equitable conversion in the vendor-purchaser relationship. And several members of the majority of the court in the *Ashford* case have while members of the bench upheld this anciently established equitable doctrine, even as to contracts containing forfeiture clauses.

A return in this state by judicial action to the well established equitable rule, it is submitted, would not substantially disturb property rights. To deprive the vendor of the equitable title would do him no great harm, inasmuch as his legal title and his contractual right of forfeiture (which is good even in equity) give him all the property and protection he needs. However, conversely, to concede the vendee for certain purposes the equitable title on the theory of equitable conversion even while the contract is still executory, would do the vendee and third persons considrable good.[113] The matter of risk of loss could, if deemed necessary, be otherwise taken care of, as heretofore mentioned, and, anyway, is usually expressly covered by contract or insured against. Even on this precise subject of risk of loss, the court has, *arguendo*, at least, espoused a rule directly contrary to that of the *Ashford* case, in a decision which involved a contract containing a forfeiture clause.[114] Incidentally a return to the principle of equit-

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[113] 2 WASH. L. REV. 1, *at* p. 10, last paragraph of article. And see 2 WILLISTON ON CONTRACTS, sec. 930, where the incidents of equitable conversion are enumerated. The vendee would gain more than he would lose.

[114] *State ex rel. Trimble v. Superior Court*, 31 Wash. 445, 461, note 27, *supra*. And see 2 WASH. L. REV. 1, at pp. 4, 6.

The result reached in *Dysart v. Colonial Fire Underwriters*, 142 Wash. 601, 254 Pac. 240 (1927), a fire insurance case involving the respective rights of vendor and vendee under an executory *forfeitable* contract of sale, really seems to be decided on the doctrine of equitable conversion, despite *Ashford v. Reese*, at least, is wholly consistent with the equitable doctrine. See 5 POMEROY EQ. JUR. (4th Ed.), sec. 2283. The contract made insurance payable to the corporate vendor "as its interest may appear," and the court adjudicates that "interest," notwithstanding the *Ashford* theory, to be a recovery only of the balance of the purchase price out of the insurance money, the rest of the money going to the vendee.

The result reached in *O'Neil v. Pacific States Fire Ins. Co.*, 128 Wash. 133, 222 Pac. 215 (1924) is likewise consistent with the equitable conversion theory, though the vendee's insurable interest is there sustained largely on the ground of estoppel. See also note 15, last paragraph.

able conversion would bring the bench and bar of this state back into an established and well-charted course of thinking on the vendor-purchaser relationship. To recede from the doctrine of the *Ashford* case would surely not constitute any greater departure from rules of property than the *Ashford* case itself constitutes a departure from the earlier decisions in this state involving executory real estate contracts containing even forfeiture clauses—decisions which it may be assumed had become just as much rules of property as the *Ashford* case may now have become, even in its present somewhat unsettled status,—and decisions which can boast a better established and much longer line of descent. A recurrence to the equitable rule of the earlier cases would seem less harmful than the departure has been. Certainly the accident of a forfeiture clause has little to commend it as a determining test in this important field, although the *Ashford* case, limited to its precise facts in this regard, to which it does not appear to have been limited in the subsequent cases, supports such a test.

If, on the other hand, legislation[115] would seem, on the whole, most desirable,[116] it appears that a brief statute instructing the court to ignore the presence of forfeiture clauses in passing on the rights of parties under executory contracts, would again make uniform and clear the law applying to real estate contracts.

ALFRED J SCHWEPPE,*

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[115] In the Laws of 1927, Ch. 278, p. 670, relating to recording of real property instruments, the definition of a "conveyance" excludes "an executory contract for the purchase and sale of lands" (no mention being made of forfeiture clauses). However, under the act referred to "executory contracts for the sale or purchase of real property" are entitled to record, "and when so recorded shall be notice to all persons of the rights of the vendee under the contract." What these rights are, is not defined in the statute. If it is claimed that the statute accepts the principle of *Ashford v. Reese*, then, in view of this statute, may it be argued that it is not open to the court to differentiate between them on the basis of the presence or absence of a forfeiture clause? Or is a real estate contract reserving title and providing for future installment payments, but not containing a forfeiture clause, no longer an "executory contract for the sale of real estate" but a real estate mortgage? Unless the latter be true, which the court in *Barton v. Tombari*, note 89, *supra*, denied, does the new recording act itself, by its generic language, repudiate any such distinction as is laid down in *Aylward v. Lally*?

[116] In regard to legislation it may be said that legislation would have the virtue of being prospective only, without affecting existing contracts, whereas a judicial overruling would be perhaps less lenient in its result, although as pointed out in the text above, it seems that no really substantial harm would be done thereby.

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